TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 849

ELMIRA NICHOLS AND PAULINE THOMPSON,
APPELLANTS,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT OF WORCESTER COUNTY,
MASSACHUSETTS

FILED APRIL 6, 1939.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1939.

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[fol. 3] **SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938**

ELMIRA NICHOLS, Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS

PAULINE THOMPSON, Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed March 2, 1939

PETITION FOR APPEAL

Considering themselves aggrieved by the judgment of conviction and sentence entered by the Superior Court for Worcester County of the Commonwealth of Massachusetts on May 23, 1938, which now stands affirmed by virtue of the overruling of their exceptions by the Supreme Judicial Court of said Commonwealth on December 21, 1938, and the rescript thereafter filed by it with the Clerk of the Superior Court of Worcester County on December 27, 1938, which operated to make said judgment of said Superior Court a final judgment, the appellants herein, Elmira Nichols and Pauline Thompson, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for [fol. 4] an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said Elmira Nichols and Pauline Thompson assign the following errors in the Record and proceeding in said case:

1. That the court below erred in failing or refusing to allow the appellants' motion to quash and dismiss the complaint and the proceedings thereunder which motion to

quash and dismiss was based upon the grounds that the ordinance of the City of Worcester upon which the complaint was based was void and unconstitutional on its face and, therefore, unenforceable; and that the freedom of the press guaranteed by the Fourteenth Amendment of the United States Constitution extends to every sort of publication which affords a vehicle of information and opinion and that the said ordinance prohibiting the distribution of literature strikes at the very foundation of and abridges the freedom of the press and therefore is unconstitutional and invalid under the doctrine as most recently set forth in the case of Lovell vs. The City of Griffin, 303 U. S. 444.

2. That the court below erred in holding that the ordinance of the city of Worcester excluding the public streets and ways from the places available for free distribution of printed matter is not a violation of section 1 of the Four-
[fol. 5] teenth Amendment of the United States Constitution and the freedom of the press guaranteed therein.

3. That the Court below erred in holding that the ordinance of the city of Worcester did not prohibit the sale of literature on the streets or ways of the city but did prohibit free distribution of the same literature on the streets or ways of said city, thus having as its object the prevention of the accumulation of litter and did not, therefore, violate section 1 of the Fourteenth Amendment of the United States Constitution and the freedom of the press guaranteed therein.

4. That the court below erred in holding that a city ordinance which restricted free distribution of literature on the streets or ways of a city and which as construed did not prohibit the sale of the same or other literature on said streets or ways of the city was a valid exercise of the police power even though both sale and free dissemination of literature would cause litter, if any, to the same extent and a prohibition of either would result in the violation of section 1 of the Fourteenth Amendment of the United States Constitution as it relates to freedom of the press.

Prayer for Reversal

Wherefore, on account of the errors hereinbefore as-
signed, petitioners pray that the said judgment of the Su-
[fols. 6-26] perior Court of the Commonwealth of Massa-

chusetts for the County of Worcester dated May 23, 1938, and which was affirmed by the Supreme Judicial Court of Massachusetts by its decision dated December 21, 1938 and the rescript thereafter filed by it with the Clerk of said Superior Court on December 27, 1938, in the above entitled cause be reversed and judgment entered in favor of these appellants.

Osmond K. Fraenkel, Sidney S. Grant, Samuel E. Angoff, Attorneys for Appellants.

Date, Feb. 28, 1939.

[File endorsement omitted.]

[fol. 27] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING BOND—Filed March 2, 1939

The petition of Elmira Nichols and Pauline Thompson, the appellants in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Superior Court for the County of Worcester of the Commonwealth of Massachusetts, having been filed with the Clerk of this court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record of this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the judgment of the Superior Court of the Commonwealth of Massachusetts for Worcester County dated May 23, 1938, which was [fol. 28] affirmed by the decision of the Supreme Judicial Court of said Commonwealth on December 21, 1938, overruling the appellants' exceptions and the rescript thereafter filed by said Court with the Clerk of said Superior Court on December 27, 1938 which operated to make said judgment a final judgment, as prayed in said petition, and that the Clerk of the Superior Court of the County of Worcester of the Commonwealth of Massachusetts shall within

forty (40) days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said Court a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that security for costs on appeal be fixed in the sum of Two Hundred and Fifty Dollars for which sum a bond with surety is to be filed by the appellants and that said appellants until further order of the Court remain at large upon the bail heretofore furnished.

John P. Higgins, Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

Date, Feb. 28, 1939.

[fol. 29] [File endorsement omitted.]

[fols. 30-34] Bond on appeal for $250.00, approved and filed March 2, 1939, omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 2, 1939

To the Clerk of the Superior Court of the Commonwealth of Massachusetts for the County of Worcester, Greeting:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to appeal duly allowed in the above entitled cause and to include in such transcript of record the following to wit:

1. All of the record of the cases docketed in the Superior Court, Criminal Session, for the County of Worcester, numbered 405 and 407, as contained in the defendants' [fol. 36] exceptions consolidating both cases and prepared by this court for the Supreme Judicial Court and being numbered 602-603.

2. All docket entries entered since the printing of the record set forth in paragraph 1.

3. A copy of the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

4. A copy of the rescripts filed with this court by the Supreme Judicial Court of the Commonwealth of Massachusetts.

5. And judgments of the Superior Court for the County of Worcester not contained in the record requested in paragraph 1.

6. The appellants' petition for appeal to the Supreme Court of the United States and their assignment of errors and prayer for reversal.

7. The order allowing appeal and fixing bond.

8. The statement as to jurisdiction.

9. The citation.

10. The bond.

11. Statement Directing Attention to Rule 12 and Proof of Service.

12. This præcipe.

Said transcript to be prepared as required by law and by the rules of the Superior Court of the Commonwealth of [fols. 37-42] Massachusetts, the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. on or before the return date of the citation.

Osmond K. Fraenkel, Sidney S. Grant, Samuel E. Angoff, Counsel for Appellants.

Dated, March 2, 1939.

Service acknowledged this second day of March, 1939.

Charles S. Barton, Assistant District Attorney, 58 Cedar Street, Worcester, Mass.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF WORCESTER COUNTY, COMMONWEALTH OF MASSACHUSETTS

Criminal

COMMONWEALTH

vs.

PAULINE THOMPSON and ELMIRA NICHOLS

SUBSTITUTE BILL OF EXCEPTIONS—Filed July 13, 1938

This is a criminal action brought against the defendants, Pauline Thompson and Elmira Nichols, for violation of an ordinance of the City of Worcester. All the facts and evidence material to the questions involved are herein contained, although the pleadings may be referred to and are made part of this Bill of Exceptions.

This case was submitted to the Superior Court without Jury, the Defendants having waived their right to a Jury trial, the facts being substantially as follows:

"The defendants on the day alleged in the complaint on a public street near Wheaton Square in the City of Worcester distributed leaflets, one of which is hereto annexed and marked Exhibit "A".

The defendants distributed a large number of these leaflets to people entering, leaving or passing by the [fol. 44] Armory, a public building in said square, while they were on said public way in said City of Worcester. The distribution was made in an orderly and peaceful manner, and the defendants did not in any way themselves throw any of the leaflets on the sidewalk or scatter them around. Some of the people to whom these leaflets were handed by the defendants, while the defendants were still distributing the leaflets, did throw them aside on the public sidewalk and on the public street, and there were approximately fifteen of these leaflets lying around on the public sidewalk and approximately fifteen lying around on the public street. The arresting officer testified that the dropping of the leaflets on the sidewalk and way caused litter thereon.

The defendants were then arrested by an officer of the City of Worcester and charged with violation of that portion of Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester which relates to the care of streets.

Chapter 36 of the Revised Ordinances of the City of Worcester is headed "Streets" and relates to the control and care of the public ways, streets and sidewalks in the City of Worcester. Section 12 reads as follows:

'No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same [fol. 45] from being blown or scattered about in the streets.'

In the Central District Court of Worcester, for Criminal Business, the defendants moved to dismiss on the grounds that the ordinance is contrary to the Constitution of the United States, Fourteenth Amendment, and void on its face.

The trial Justice denied the motion and found the defendants guilty and fined the defendants Five Dollars ($5.00) each. The defendants thereupon appealed to the Superior Court for Worcester County."

At the beginning of the case, before evidence was introduced, the defendants duly moved to quash and dismiss on the ground that the complaint did not allege a crime; that the ordinance was unconstitutional and void on its face; and, that the ordinance violated the freedom of the press guaranteed by the First Amendment of said Constitution of the United States, by the Fourteenth Amendment of said Constitution and by the Constitution of the Commonwealth of Massachusetts. The trial Justice of the Superior Court denied the motion to quash and dismiss, to which ruling the defendants, being aggrieved, thereby duly except and pray that their exceptions be allowed. The trial Justice of the Superior Court after hearing the evidence, found the defendants guilty.

By Their Attorneys, Grant & Angoff.

[fol. 46] [File endorsement omitted.]

Exceptions Allowed July 15, 1938.
William A. Burns, Justice of the Superior Court.

[fol. 47] EXHIBIT "A"

Protest Meeting

Saturday, Apr. 16—2 P. M.

Worcester Common

Speakers:

A. Frank Reel

well known Boston Labor Lawyer

Daniel Murray

President Worcester Industrial Union Council

Ernest B. Sykes

President Whittall Group of Local 15 TWOC

Unemployment Insurance. Are you getting your check on time? We paid the money when we worked. We demand it when we need it. Make Gov. Hurley remove his incompetent friends from the Insurance Commission and put qualified Civil Service Servents in their place.

Welfare and Relief. What are we going to do when our unemployment insurance runs out? It is the duty of Government to provide jobs or relief. There must be No Starvation in Worcester. Increase the WPA.

Wage Cuts. Worcester employers are cutting wages and trying to blame the Depression on Roosevelt. Low Wages mean less purchasing power, means a worse depression. [fol. 48] Stop Wage Cuts in Worcester.

Worcester Industrial Union Council,

26 Trumbull Street.

[fol. 49] IN CENTRAL DISTRICT COURT OF WORCESTER

COMMONWEALTH OF MASSACHUSETTS

COMPLAINT

To the Central District Court of Worcester, in the County of Worcester, and Commonwealth of Massachusetts:

Robert T. Hardy of Worcester, in said County, in behalf of said Commonwealth, on oath complains that El-

mira Nichols of said Holden on the fourteenth day of April in the year nineteen hundred and thirty-eight at Worcester, in said County, did upon a certain street, to wit: Wheaton Sq-are, distribute handbills, flyers, advertisements or papers.

[On left margin:] vio. city ord.

Chap. 36 sec. 12 as amended.

off. Louwrey Miller.

And he prays that the said Defendant be arrested and held to answer to this complaint and further dealt with relative thereto, according to law, and that the Complainant and Deft.—5 Hawthorne Rd. Holden—be summoned, to testify what they know relative to the subject matter thereof, before said Court.

Robert T. Hardy, Complainant.

WORCESTER, ss:

Received and sworn to this fourteenth day of April in the year of our Lord one thousand nine hundred and [fol. 50] thirty-eight before said Court.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

(Reverse Side of Complaint:)

13 [405]*

No. 1878 1938

Com. vs. Elmira Nichols
on complaint of Robert T. Hardy
for Vio. City Ord.
Rec'd fourteenth April 1938
Complaint,
Central District Court of Worcester,
Commonwealth of Massachusetts

JUDGMENT

WORCESTER, ss:

On this complaint the Defendant is before the Central District Court of Worcester in the County of Worcester,

[* Figures enclosed in brackets erased in copy.]

on the twenty-first day of April A. D. 1938 and said com-
[fol. 51] plaint is read to him/her and she says that thereof she is not guilty after hearing all matters and things concerning the same it is adjudged by the said District Court that said Defendant is guilty.

It is thereupon ordered by the said District Court that the said Defendant pay a fine of $5.00 and in default thereof that he stand committed to either of the Houses of Correction in said County, till the same be paid or said Defendant be otherwise discharged in due course of law.

From this order the Defendant was notified of her right to appeal.

From this decision said Defendant appeals, and is thereupon ordered to recognize with sureties in the sum of $50 for his/her personal appearance before the Superior Court, next to be holden at Worcester, within and for said County, on first Monday of May next for the transaction of criminal business, then and there to prosecute said appeal according to law, and in default thereof that he stand committed to Jail in said County till said Defendant enters into such recognizance or said Defendant be otherwise discharged in due course of law. With this order said Defendant complies, personal recognizance.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

[fol. 52] In Superior Court of Worcester County

Commonwealth

vs.

Elmira Nichols

Defendant's Motion to Quash and Dismiss—Filed May 23, 1938

Now comes the defendant and moves that the above named complaint be quashed and dismissed as to her and assigns therefor the following reasons:

First. That the complainant neither in form nor substance charges any crime to have been committed by the said defendant.

Second. That this ordinance of the City of Worcester, being void and unconstitutional on its face is, therefore, unenforceable against this defendant.

Alma Lovell, appellant vs. The City of Griffin, United States Supreme Court, March 28, 1938, Chief Justice Hughes.

Third. That the freedom of the press guaranteed by the first amendment to the Constitution of the United States, by the Fourteenth Amendment of said Constitution and [fol. 53] by the Constitution of the Commonwealth of Massachusetts, extends to every sort of publication which affords a vehicle of information and opinion. That to prohibit the distribution of literature strikes at the very foundation of the freedom of the press; that the ordinance of the City of Worcester, under which the defendant in being prosecuted, contravenes these basic mandates, in that the said ordinance abridges the freedom of the press. Wherefore, the said ordinance is unconstitutional and invalid.

Alma Lovell, Appellant, vs. The City of Griffin, supra.

By Her Attorneys, Grant & Angoff.

May 23, 1938. Filed & denied & Exception saved. (Burns, J.) Attest: Philip S. Smith, Ass't Clerk.

[fol. 54] In Superior Court of Worcester County

Comm., Plff.

Elmira Nicholas, Deft.

Notice of Waiver of Jury Trial—Filed May 23, 1938

In the above entitled action the defendant gives notice that she desires to waive her right to a trial by jury.

Elmira Nichols.

Witness: Sidney S. Grant.

[File endorsement omitted.]

[fol. 55] IN SUPERIOR COURT OF WORCESTER COUNTY

FINDING OF GUILTY—May 23, 1938

In the Action, COMMONWEALTH against ELMIRA NICHOLAS

The Court finds the Defendant Guilty.

William A. Burns, Justice of the Superior Court.

[fol. 56] IN SUPERIOR COURT OF WORCESTER COUNTY

No. 405

COMMONWEALTH

vs.

ELMIRA NICHOLS

ORDER GRANTING STAY OF EXECUTION OF SENTENCE—Filed May 23, 1938

I hereby certify that in my opinion there is reasonable doubt whether the judgment should stand, and a stay of execution of sentence is hereby granted.

William A. Burns, Presiding Justice.

May 23rd, 1938.

[File endorsement omitted.]

[fol. 57] IN CENTRAL DISTRICT COURT OF WORCESTER

COMMONWEALTH OF MASSACHUSETTS

COMPLAINT

To the Central District Court of Worcester, in the County of Worcester, and Commonwealth of Massachusetts:

Robert T. Hardy of Worcester, in said County, in behalf of said Commonwealth, on oath complains that Pauline Thompson of said Worcester, on the fourteenth day of April in the year nineteen hundred and thirty-eight at Worcester, in said County, did upon a certain street, to wit;

Wheaton Square, distribute handbills, flyers, posters, advertisements or papers

[On left margin:] Vio city Ord.

Chap. 36 Sec. 12 as amended.

off. Lowrey Miller.

And he prays that the said Defendant be arrested and held to answer to this complaint and further dealt with relative thereto, according to law, and that the Complainant and Deft.—5 Hawthorne Rd. Holden—be summoned, to testify what they know relative to the subject matter thereof, before said Court.

Robert T. Hardy, Complainant.

WORCESTER, ss:

Received and sworn to this fourteenth day of April in the year of our Lord one thousand nine hundred and thirty-
[fol. 58] eight before said Court.

Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

(Reverse Side of Complaint:)

14 [407]*

No. 1877 1938

Com. vs. Pauline Thompson
on complaint of Robert T. Hardy
for Pas. out handbills
Vio City ord.
Rec'd fourteenth April 1938
Complaint,
Central District Court of Worcester,
Commonwealth of Massachusetts

JUDGMENT

WORCESTER, ss:

On this complaint the Defendant is before the Central Dis-
[fol. 59] trict Court of Worcester in the County of Worcester,

[* Figures enclosed in brackets erased in copy.]

on the twenty-first day of April A. D. 1938 and said complaint is read to her and she says that thereof she is not guilty but after hearing all matters and things concerning the same it is adjudged by the said District Court that said Defendant is guilty.

It is thereupon ordered by the said District Court that the said Defendant pay a fine of $5.00 and in default thereof that he stand committed to either of the Houses of Correction in said County, till the same be paid or said Defendant be otherwise discharged in due course of law.

From this order the Defendant was notified of his/her right to appeal.

From this decision said Defendant appeals, and is thereupon ordered to recognize with sureties in the sum of $50 for her personal appearance before the Superior Court, next to be holden at Worcester, within and for said County, on first Monday of May next for the transaction of criminal business, then and there to prosecute said appeal according to law, and in default thereof that he stand committed to Jail in said County till said Defendant enters into such recognizance or said Defendant be otherwise discharged in due course of law. With this order said Defendant complies, personal recognizance.

[fol. 60] Wesley E. Mellquist, Clerk.

A Copy. Attest, Wesley E. Mellquist, Clerk.

[fol. 61] In Superior Court of Worcester County

Commonwealth

vs.

Pauline Thompson

Defendant's Motion to Quash and Dismiss—Filed May 23, 1938

Now comes the defendant and moves that the above named complaint be quashed and dismissed as to her and assigns therefor the following reasons:

First. That the complaint neither in form nor substance charges any crime to have been committed by the said defendant.

Second. That this ordinance of the City of Worcester, ter, being void and unconstitutional on its face is, therefore, unenforceable against this defendant.

Alma Lovell, Appellant vs. The City of Griffin, United States Supreme Court, March 28, 1938, Chief Justice Hughes.

Third. That the freedom of the press guaranteed by the first amendment to the Constitution of the United States; by the Fourteenth Amendment of said Constitution and by the Constitution of the Commonwealth of Massachusetts, [fol. 62] extends to every sort of publication which affords a vehicle of information and opinion. That to prohibit the distribution of literature strikes at the very foundation of the freedom of the press; that the ordinance of the City of Worcester, under which the defendant is being prosecuted, contravenes these basic mandates, in that the said ordinance abridges the freecom of the press. Wherefore, the said ordinance is unconstitutional and invalid.

By Her Attorneys, Grant & Angoff.

May 23, 1938. Filed & denied & exception saved. (Burns, J.) Attest: Philip S. Smith, Ass't Clerk.

[fol. 63] In Superior Court of Worcester County

Comm., Plff.,

—

Pauline Thompson, Deft.

Notice of Waiver of Jury Trial—Filed May 23, 1938

In the above entitled action the defendant gives notice that she desires to waive her right to a Trial by Jury.

Pauline Thompson.

Witness: Sidney S. Grant.

[File endorsement omitted.]

[fol. 64] In Superior Court of Worcester County

Finding of Guilty—May 23, 1938

In the Action, Commonwealth against Pauline Thompson

The Court finds the Defendant Guilty.

William A. Burns, Justice of the Superior Court.

[fol. 65] In Superior Court of Worcester County

No. 407

Commonwealth

vs.

Pauline Thompson

Order Granting Stay of Execution of Sentence—Filed May 23, 1938

I hereby certify that in my opinion there is reasonable doubt whether the judgment should stand, and a stay of execution of sentence is hereby granted.

William A. Burns, Presiding Justice.

May 23rd, 1938.

[File endorsement omitted.]

[fol. 66] In Superior Court of Worcester County

Commonwealth

vs.

Pauline Thompson

Motion to Consolidate—Filed July 13, 1938

Now comes the defendant in the above entitled action and moves that her case be consolidated with the case of Commonwealth vs. Elmira Nichols, now pending on Exceptions, on the ground that the crime alleged in both cases

was committed jointly and arises out of the same circumstances.

By Her Attorneys, Grant & Angoff.

July 13, 1938.

I hereby assent to the allowance of this motion.

Alfred B. Cenedella, Ass't Dist. Atty.

[File endorsement omitted.]

Allowed.

William A. Burns, J. S. C.

July 15/38.

[fol. 67] In Superior Court of Worcester County

No. 13

May '38—405

Worcester

Vio. City Ord.

Docket Entries

Commonwealth of Massachusetts

vs.

Elmira Nichols, Appt.

Counsel for Comth.: Owen A. Hoban, Dist. Atty.; Alfred B. Cenedella, Ass't Dist. Atty.
Counsel for Deft.: Sidney S. Grant, 89 State St., Boston.

May 23/38. Deft's. mo. to quash & dismiss filed & denied & exception saved (Burns, J.).
Deft's. waiver to right of trial by jury filed.
Finding of "Guilty" by Court after hearing (Burns, J.).
Sentence, Fine $5.
Stay of exon. of sentence granted.
Recogs. personally.
May 26/38. Deft's. Bill of Exceptions filed.
July 13/38. Substitute Bill of Exceptions filed.
July 15/38. Exceptions allowed (Burns, J.).

Dec. 27/38. Rescript received & filed, viz: "Exceptions overruled."

Mar. 2/39. Pet. for appeal to Supreme Court of the U. S., assignment of errors & prayer for reversal filed.

Appellant's statement disclosing basis of jurisdiction (including opinion) to Supreme Court of U. S., filed.

Order of John P. Higgins, Chief Justice of Superior Court, allowing appeal & fixing bond filed.

Bond filed.

Citation to appellee filed.

Statement directing attention to Rule 12, Sup. Ct. of U. S., & proof of service filed.

Praecipe of appellant for transcript of record filed.

Mar. 17/39. Appellee's statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of U. S. & motion to dismiss filed.

Vio.	Violation
Ord.	Ordinance
Deft's.	Defendant's
Mo.	Motion
J.	Justice
Exon.	Execution
Recogs.	Recognizes
Pet.	Petition

[fol. 68] In Superior Court of Worcester County

No. 14

May '38—407

Worcester

Vio. City Ord.

Docket Entries

Commonwealth of Massachusetts

vs.

Pauline Thompson, Appt.

Counsel for Comth.: Owen A. Hoban, Dist. Atty.; Alfred B. Cenedella, Ass't Dist. Atty.

Counsel for Deft.: Sidney S. Grant, 89 State St., Boston.

May 23/38. Deft's. mo. to quash & dismiss filed & denied & exception saved. (Burns, J.)

Deft's. waiver to right of trial by jury filed.
Finding of "Guilty" by Court after hearing (Burns, J.).
Sentence, Fine $5.
Stay of exon. of sentence granted.
Recogs. personally.
May 26/38. Deft's. Bill of Exceptions filed.
July 13/38. Mo. to consolidate with (#405) #13 filed.
Substitute Bill of Exceptions filed.
July 15/38. Exceptions allowed (Burns, J.).
Mo. to consolidate with (#405) #13 allowed.
Dec. 27/38. Rescript received & filed, viz: "Exceptions overruled."
Mar. 2/39. Pet. for appeal to Supreme Court of the U. S., assignment of errors & prayer for reversal filed.
Appellant's statement disclosing basis of jurisdiction (including opinion) to Supreme Court of U. S., filed.
Order of John P. Higgins, Chief Justice of Superior Ct. allowing appeal & fixing bond filed.
Bond filed.
Citation to appellee filed.
Statement directing attention to Rule 12, Sup. Ct. of U. S., & proof of service filed.
Praecipe of appellant for transcript of record filed.
Mar. 17/39. Appellee's statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of U. S. & motion to dismiss filed.

Vio.	Violation
Ord.	Ordinance
Deft's.	Defendant's
Mo.	Motion
J.	Justice
Exon.	Execution
Recogs.	Recognizes
Pet.	Petition

[fol. 69] In Supreme Judicial Court of Massachusetts

Rescript—December 21, 1938

In the Case of

Commonwealth

vs.

Elmira Nichols

pending in the Superior Court for the County of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:

Exceptions overruled.

By the Court, Walter F. Frederick, Clerk.

December 21, 1938.

Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

Filed Dec. 27, 1938. Attest, William C. Bowen, Clerk.

[fol. 70] In Supreme Judicial Court of Massachusetts

Rescript—December 21, 1938

In the Case of

Commonwealth

vs.

Pauline Thompson

pending in the Superior Court for the County of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:

Exceptions overruled.

By the Court, Walter F. Frederick, Clerk.

December 21, 1938.

Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

Filed Dec. 27, 1938. Attest, William C. Bowen, Clerk.

[fol. 71] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

QUA, J.

Each defendant has been convicted and fined $5 for violation of c. 36, § 12, of the Revised Ordinances of the city of Worcester, which reads as follows: "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

At the beginning of the trial, before any evidence was introduced, each defendant moved "to quash and dismiss" the complaint against her on the ground that it did not charge the commission of any crime and that the ordinance was unconstitutional and void. In each case the only exception is to the denial of the motion. In each case the only point raised and argued is that the ordinance is void on its face in that it interferes with the freedom of the press as guaranteed by § 1 of the Fourteenth Amendment to the Constitution of the United States and by art. 16 of the Bill of Rights of the Constitution of this Commonwealth. We confine our discussion to this point, and we assume in accordance with the trend of recent decisions that freedom of the press is a "liberty" protected by the due process clause of the Fourteenth Amendment against interference by State law; that, for present purposes, a duly authorized city ordinance is a State law; and that liberty of the press extends to the kinds of printed matter to which the ordinance refers and includes distribution as well as publication. Lovell v. Griffin, 303 U. S. 444, 450, 452, and cases cited.

In the recent case of Commonwealth v. Kimball, Mass. [fol. 72] Adv. Sh. (1938) 267, we had occasion to consider the validity of an ordinance of Fall River the main portion of which, exclusive of a proviso at the end, was substantially the same as the ordinance here involved. We there held that the ordinance, considered apart from the proviso, was valid. On page 271 we said, "The distribution of handbills or similar papers in streets tends to annoy travelers and abutters, to obstruct the streets, and to litter them with paper. It seems to us a valid exercise of the power to main-

tain the 'internal police' of a city, to prohibit such distribution entirely." Many cases were cited in support of that statement. Although there are cases to the contrary, we felt and we still feel that the cases cited represent the sounder view. Reference to the original papers in the Kimball case shows that the same contention was argued there that is argued here. That case is a precedent upon the issue here presented. Ordinarily we would regard such a precedent as decisive and would forbear further discussion. But it is pressed upon us that the case of Lovell v. Griffin, 303 U. S. 444, decided a few weeks after the Kimball case was decided, is inconsistent with that case, and it therefore becomes our duty to consider whether we are now required to modify our views.

Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired. This principle is fully recognzed in recent decisons of the Supreme Court of the United States. Gitlow v. New York, 268 U. S. 652, 666, 667. Whitney v. California, 274 U. S. 357, 371. Stromberg v. California, 283 U. S. 359, 368. Near v. Minnesota, [fol. 73] 283 U. S. 697, 707, 708. DeJonge v. Oregon, 299 U. S. 353, 364. See Commonwealth v. Blanding, 3 Pick. 304, 313; Commonwealth v. Libbey, 216 Mass. 356; Commonwealth v. Karvonen, 219 Mass. 30; Commonwealth v. Anderson, 272 Mass. 100, 106. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago, Burlington & Quincy Railroad v. McGuire, 219 U. S. 549, 567. The question before us is whether we can properly say that the ordinance is not a reasonable regulation of the use of the streets affecting only incidentally one method of distribuing printed matter, but that it is an actual impairment of the constitutional freedom of the press. We are justified in overriding the judgment of the city's legislative body only if its action is clearly beyond the scope of its power. Commonwealth v. Mulhall, 162 Mass. 496, 498.

The wording of the section of the ordinance as a whole indicates that it was directed to the object of preventing the

accumulation of litter and rubbish in the streets and preserving the comfort and preventing the annoyance of travellers, and that it was not directed against the liberty of the press. Properly construed, we see no reason why in practical operation it should extend beyond the legitimate purpose for which it was designed. It does not prevent the casual passing of papers from one traveller to another in isolated instances. See Commonwealth v. Ellis, 158 Mass. 555. It forbids persons to "distribute". This implies an offering to many people, with the consequent probability of littering the neighborhood with papers which, if not painstakingly gathered by someone, will become unsightly, annoying and obnoxious. We think that the word "distribute," in connection with the other language used and in view of the apparent object of the section, does not include [fol. 74] sale, and that the ordinance does not forbid the sale of newspapers or other printed matter in the streets. The section is not in any sense directed toward the suppression of idea, theories or opinions. It involves no censorship. It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private.

In Commonwealth v. Morrison, 197 Mass. 199, at page 204, this court said, "The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose." Opinion of the Justices, Mass. Adv. Sh. (1937) 615, 617. The constitutional right of free speech cannot be so exercised as to obstruct the public in the enjoyment of its easement of travel. Commonwealth v. Surridge, 265 Mass. 425. See Commonwealth v. Davis, 140 Mass. 485; Commonwealth v. Abrahams, 156 Mass. 57; Commonwealth v. Davis, 162 Mass. 510, affirmed, Davis v. Massachusetts, 167 U. S. 43. The constitutional right to freedom of religious worship does not prevent the enforcement of reasonable rules and regulations for the use of streets and public places. Commonwealth v. Plaisted, 148 Mass. 375. The preservation of the public right of travel in the streets against annoyances of any kind has always been a proper subject of legislative action. Commonwealth v. Fox, 218 Mass. 498. Opinion of the Justices, 251 Mass. 569, 595.

Commonwealth v. Boston & Maine Transportation Co., 282 Mass. 345, 348. General Outdoor Advertising Co. Inc. v. Department of Public Works, 289 Mass. 149, 181.

In our opinion this case is to be distinguished from Lovell [fol. 75] v. Griffin, 303 U. S. 444, upon which the defendants principally rely. The ordinance which was there struck down was not a regulation of the use of the streets. It was an absolute prohibition of the distribution of "literature of any kind" anywhere within the city, whether delivered free or sold, without the written permission of the city manager. The city manager was thus made the sole arbiter, apparently without appeal, as to what literature of any kind should be allowed within the city. Plainly such an ordinance goes far beyond reasonable regulation and infringes upon fundamental rights. The court said of that ordinance, "It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestatio of the inhabitants, or the misuse or littering of the streets." 303 U. S. at page 451.

We hold that the section of the ordinances of Worcester here involved is not a denial or impairment of the freedom of the press, but that it is a reasonable and valid regulation of the use of the public ways for the preservation of public order, the protection of travellers from annoyance, and the prevention of misuse or littering of the streets, and that it affects the right of publication only collaterally and incidentally by curbing what the city may regard as abuses detrimental to the public in the manner of the exercise of that right. Commonwealth v. McCafferty, 145 Mass. 384. Commonwealth v. Haffer, 279 Mass. 73. Commonwealth v. Kimball, Mass. Adv. Sh. (1938) 267. Our opinion is fully supported by well reasoned decisions of the courts of last resort of Nebraska and of Wisconsin in closely parallel cases. In re Anderson, 69 Neb. 686. Milwaukee v. Kassen, 203 Wis. 383. Whether the legitimate objects of [fols. 76-77] the section could be substantially accomplished by less sweeping provisions is a matter for the consideration of the city's legislative body and not for us.

It follows that the complaints duly charged a criminal offence, and that there was no error in denying the motions to quash and dismiss them.

In each case the entry will be
Exceptions overruled.

Reporter's certificate to foregoing paper omitted in printing.

[fols. 78-79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] Judge's certificate to clerk omitted in printing.

[fol. 81] Clerk's certificate to judge omitted in printing.

[fol. 82] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed April 6, 1939

Appellants intend to rely upon the following points and, in support thereof, state that they believe that the entire record is necessary for the consideration thereof:

1. The ordinance under which appellants were convicted (Ordinance of the City of Worcester, Chapter 36, Section 12) is unconstitutional on its face in that said ordinance violates appellants' rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by denying them freedom of speech and freedom of the press.

[fol. 83] 2. The ordinance under which appellants were convicted (Ordinance of the City of Worcester, Chapter 36, Section 12) is unconstitutional as applied to appellants in that said ordinance denies appellants due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, March —, 1939.

Osmond K. Fraenkel, Sydney S. Grant, Samuel E. Angoff, Attorneys for Appellants. Of Counsel:

— —.

Mar. 10, 1939.

Service acknowledged this tenth day of March, 1939.
Alfred B. Cenedella, Assistant District Attorney,
175 Congress St., Milford, Mass.

[fol. 84] [File endorsement omitted.]

Endorsed on cover: File No. 43,334. Massachusetts, Superior Court, County of Worcester. Term No. 849. Elmira Nichols and Pauline Thompson, Appellants, vs. Commonwealth of Massachusetts. Filed April 6, 1939. Term No. 849, O. T., 1938.

FILE COPY

APR 6 1939

CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 849 29

ELMIRA NICHOLS AND PAULINE THOMPSON,
Appellants,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT, COUNTY OF WORCESTER, COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 849

ELMIRA NICHOLS,

Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS.

PAULINE THOMPSON,

Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR THE COUNTY OF WORCESTER.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This Court has jurisdiction of this appeal because it is a case wherein was drawn in question the validity of a municipal ordinance of the city of Worcester in the Commonwealth of Massachusetts and the operation thereof as being repugnant to a provision of the Constitution of the United States and the decision of the highest court

in the Commonwealth of Massachusetts, in which a decision could be had, was in favor of the validity of said municipal ordinance and its operation.

The Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 937, gives jurisdiction to this Court on writ of error to "a final judgment or decree in any suit in the highest court of the state in which a decision could be had where is drawn in question * * * the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity".

For the purposes of review by the United States Supreme Court a State statute includes municipal ordinances as well as legislative enactments.

King Mfg. Co. v. *Augusta*, 277 U. S. 100;

New Orleans Publishing Service v. *New Orleans*, 281 U. S. 682.

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be reviewed as a matter of right on writ of error.

The decision of the Supreme Judicial Court of Massachusetts sustaining the validity of the ordinance and its operation was rendered on the twenty-first day of December, 1938, the same appearing on page 1969 *et seq.* of the Advance Sheets of the Massachusetts Reporter for the year 1938, and which will also be found in 18 N. E. (2d) 166. Said decision was rendered by the highest court of the Commonwealth of Massachusetts and is a final decision upon all the constitutional issues involved in the case and reaffirms and makes final the judgment of the Superior Court. The said decision is herewith annexed and marked as Appendix "A".

This case is a criminal prosecution begun as a complaint against the appellants for distributing leaflets in alleged violation of an anti-littering ordinance of the city of Worcester. The history of the case is as follows: The appellants were distributing leaflets in a public square of Worcester; this they were doing in an orderly and peaceful manner. They themselves were not scattering any of the leaflets but some of the persons to whom they were handed did throw them on the streets.

The appellants were then arrested by an officer of the city of Worcester and charged with violation of that portion of Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester which reads that "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets" (R. 1).

In the Central District Court of Worcester both appellants move to dismiss on the grounds that the ordinance was contrary to the Constitution of the United States, Fourteenth Amendment and void on its face. The motion was denied and the appellants were fined five dollars ($5.00) (R. 2).

They then appealed to the Worcester Superior Court where a trial *de novo* was had without jury. At the beginning of the case, before evidence was introduced, the appellants duly moved to quash and dismiss on the following grounds (R. 4, 7):

First. That the complaint neither in form nor in substance charges any crime to have been committed by the said appellants;

Second. That the ordinance of the city of Worcester being void and unconstitutional on its face is, therefore, unenforceable against the appellants (citing *Lovell* v. *The City of Griffin*, 303 U. S. 444); and,

Third. That the freedom of the press guaranteed by the Fourteenth Amendment of the United States Constitution extends to every sort of publication which affords a vehicle of information and opinion and that to prohibit the distribution of literature strikes at the very foundation of the freedom of the press and that the said ordinance of the city of Worcester under which the appellants are being prosecuted contravenes these basic mandates in that the said ordinance abridges the freedom of the press and is, therefore, unconstitutional and invalid.

The trial judge denied the motion to quash and dismiss and found the appellants guilty (R. 5, 8). The appellants duly filed exceptions and the case was heard by the Supreme Judicial Court of Massachusetts which later rendered an opinion upholding the validity of the ordinance, denying the appellants' motion to quash and dismiss and reaffirming their conviction. In the said court's opinion the ordinance did not violate the freedom of the press guaranteed by Section 1 of the Fourteenth Amendment of the United States Constitution and did not fall within the principles enunciated in *Lovell* v. *The City of Griffin*, 303 U. S. 444. The State court also ruled that the ordinance did not apply to the sale of printed matter or to its casual passing by one traveller to another but only to its free distribution on the streets of the city of Worcester and was constitutional, therefore, and not a violation of the freedom of press as aforesaid or in conflict with the decision of *Lovell* v. *The City of Griffin*, *supra*. (See Appen. "A", *post*).

The ordinance in question, Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester, has been here-

tofore set out in the facts. Reference to pages 4, 5, 7 and 8 of the record shows that the validity of the foregoing ordinance was drawn in question as being repugnant to Section 1 of the Fourteenth Amendment of the Federal Constitution which states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

That this provision of the Constitution applied to "freedom of the press" is fully and aptly demonstrated by the case of *Lovell* v. *The City of Griffin, supra,* the most recent case on this subject.

Appellants cite the following decisions of the Supreme Court of the United States as indicating that this tribunal has jurisdiction to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts upon the validity of a municipal ordinance and its operation in this case, which validity was drawn in question in the original prosecution and passed upon by the highest court of the State.

Lovell v. *City of Griffin,* 303 U. S. 444;
Yick Wo v. *Hopkins,* 118 U. S. 356;
Asakura v. *Seattle,* 265 U. S. 332;
Barbier v. *Connelly,* 113 U. S. 27;
Gundling v. *Chicago,* 177 U. S. 183;
Schmidinger v. *Chicago,* 226 U. S. 578.

The constitutional questions raised are serious and not frivolous.

Zucht v. *King,* 260 U. S. 174, 176;
Lovell v. *City of Griffin, supra.*

The purpose of the appellants is to show that an ordinance such as the one in question which purports to regulate the littering of streets is in reality and effect one that creates an unreasonable if not a total restriction on the free dissemination of literature and opinion and is thus in violation of the right of freedom of the press.

In California and Wisconsin recent decisions have been rendered adverse to the contention of the appellants which have held that city ordinances similar to the one in question were constitutional.

Young v. *People of California*, 85 P. (2d.) 231;
City of Milwaukee v. *Snyder* (a Wisconsin case argued at the August term of the State Supreme Court; the citation of which is not available at this writing).

The appellants are informed that the above cases are also in the process of being appealed to this tribunal.

However, other jurisdictions have held that this same type of anti-littering ordinance is unconstitutional.

People v. *Armstrong*, 73 Mich. 288;
People v. *Johnson*, 191 N. Y. S. 750.

More recently the doctrine that such ordinances are unconstitutional is reaffirmed in the cases of *People ex Rel. Gordon* v. *McDermott*, 169 N. Y. Misc. 743, and *C. I. O.* v. *Hague*, 25 Fed. Supp. 127, affirmed by the Third Circuit Court of Appeals January 26, 1939, the appeal of which is now pending before this Court.

That the questions raised are substantial and merit consideration can be seen from the protracted discussion by the State court and its consideration of the opinion in the *Lovell* v. *The City of Griffin* (*supra*) case; the close comparison of the facts in this case with those in *Lovell* v. *The City of Griffin* and other like cases; the effect of the ordinance, rather than its stated purpose, as violating freedom

of the press; and whether or not the doctrine of the case of *Lovell* v. *The City of Griffin* may be held to be inapplicable by a State court which construed the ordinance in question as prohibiting free distribution of literature, but not sale thereof, on the streets of the city instead of within the city limits.

Thus it may be clearly seen that the validity of the municipal ordinance was drawn in question as being repugnant to the freedom of the press guaranteed under said section and article of the United States Constitution and that the decision of the Supreme Judicial Court, which was the highest court in the Commonwealth of Massachusetts in which a decision could be had, was in favor of the validity of said ordinance and considered and passed upon the Federal question raised in the trial court.

The Court has before it an ordinance which is similar to many others, all of which purport to prevent the littering of streets but which actually result in a prohibition of the dissemination of literature. If this type of ordinance is held to be valid it will seriously curtail the right of individuals and trade union, religious, political or other associations to circulate information and opinion among the public. All individuals or organizations who are unable to resort to either the newspaper or to the radio as a medium for reaching the public, whether because of lack of wealth or affluence, or because of their current unpopularity, are forced to distribute printed matter on the streets as, perhaps, their only other effective means of disseminating their opinion. To deny them the right to distribute literature on the public streets would, in effect, deny them the opportunity of circulating their thought and opinion in printed form to the public.

If the purpose of the ordinance is to prevent littering, this can hardly be accomplished under the construction placed upon it by the State court. The unrestricted sale of printed

matter on public streets would have the same tendency to cause litter thereon as would free dissemination of the same literature. The net result is that the ordinance, as construed by the State court, on the one hand permits littering in some instances, thus defeating its avowed purpose, and on the other hand totally forbids the distribution of free literature thus denying the right of freedom of the press.

Only while free speech and free press are guarded from the restrictions and burdens which have destroyed these rights in many countries in Europe can democracy continue to flourish. So-called anti-littering ordinances which operate to prevent the dissemination of printed matter to the public should not be countenanced because they are clothed with the purpose of keeping litter from accumulating on the streets. Freedom of press in this country is far more important than the comparatively insignificant annoyance of an occasional untidy street.

Respectfully submitted,

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
Attorney for Appellants.

APPENDIX "A".

QUA, *Justice:*

Each defendant has been convicted and fined $5 for violation of c. 36, s. 12, of the Revised Ordinances of the city of Worcester, which reads as follows: "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

At the beginning of the trial, before any evidence was introduced, each defendant moved "to quash and dismiss" the complaint against her on the ground that it did not charge the commission of any crime and that the ordinance was unconstitutional and void. In each case the only exception is to the denial of the motion. In each case the only point raised and argued is that the ordinance is void on its face in that it interferes with the freedom of the press as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States, U. S. C. A. Const. Amend. 14, s. 1, and by art. 16 of the Declaration of Rights of the Constitution of this Commonwealth. We confine our discussion to this point, and we assume in accordance with the trend of recent decisions that freedom of the press is a "liberty" protected by the due process clause of the Fourteenth Amendment against interference by State law; that, for present purposes, a duly authorized city ordinance is a State law; and that liberty of the press extends to the kinds of printed matter to which the ordinance refers and includes distribution as well as publication. Lovell *v.* Griffin, 303 U. S. 444, 450, 452, 58 S. Ct. 666, 82 L. Ed. 949, and cases cited.

In the recent case of Commonwealth *v.* Kimball, Mass. 13 N. E. 2d 18, 114 A. L. R. 1440, we had occasion to consider the validity of an ordinance of Fall River the main portion of which, exclusive of a proviso at the end, was substantially the same as the ordinance here involved. We there held that the ordinance, considered apart from the proviso,

was valid. On page 21 we said, "The distribution of handbills or similar papers in streets tends to annoy travelers and abutters, to obstruct the streets, and to litter them with paper. It seems to us a valid exercise of the power to maintain the 'internal police' of a city, to prohibit such distribution entirely." Many cases were cited in support of that statement. Although there are cases to the contrary, we felt and we still feel that the cases cited represent the sounder view. Reference to the original papers in the Kimball Case shows that the same contention was argued there that is urged here. That case is a precedent upon the issue here presented. Ordinarily we would regard such a precedent as decisive and would forbear further discussion. But it is pressed upon us that the case of Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, decided a few weeks after the Kimball Case was decided, is inconsistent with that case, and it therefore becomes our duty to consider whether we are now required to modify our views.

Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired. This principle is fully recognized in recent decisions of the Supreme Court of the United States. Gitlow *v.* New York, 268 U. S. 652, 666, 667, 45 S. Ct. 625, 69 L. Ed. 1138; Whitney *v.* California, 274 U. S. 357, 371, 47 S. Ct. 641, 71 L. Ed. 1095; Stromberg *v.* California, 283 U. S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484; Near *v.* Minnesota, 283 U. S. 697, 707, 708, 51 S. Ct. 625, 75 L. Ed. 1357; De Jonge *v.* Oregon, 299 U. S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278. See Commonwealth *v.* Blanding, 3 Pick. 304, 313, 15 Am. Dec. 214; Commonwealth *v.* Libbey, 216 Mass. 356, 103 N. E. 923, 49 L. R. A., N. S., 879, Ann. Cas. 1915B, 659; Commonwealth *v.* Karvonen, 219 Mass. 30, 106 N. E. 556, L. R. A. 1915B, 706, Ann. Cas. 1916D, 846; Commonwealth *v.* Anderson, 272 Mass. 100, 106, 172 N. E. 114, 69 A. L. R. 1097. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions

imposed in the interests of the community." Chicago, Burlington & Quincy Railroad Co. *v.* McGuire, 219 U. S. 549, 567, 31 S. Ct. 259, 262, 55 L. Ed. 328. The question before us is whether we can properly say that the ordinance is not a reasonable regulation of the use of the streets affecting only incidentally one method of distributing printed matter, but that it is an actual impairment of the constitutional freedom of the press. We are justified in overriding the judgment of the city's legislative body only if its action is clearly beyond the scope of its power. Commonwealth *v.* Mulhall, 162 Mass. 496, 498, 39 N. E. 183, 44 Am. St. Rep. 387.

The wording of the section of the ordinance as a whole indicates that it was directed to the object of preventing the accumulation of litter and rubbish in the streets and preserving the comfort and preventing the annoyance of travellers, and that it was not directed against the liberty of the press. Properly construed, we see no reason why in practical operation it should extend beyond the legitimate purpose for which it was designed. It does not prevent the casual passing of papers from one traveller to another in isolated instances. See Commonwealth *v.* Ellis, 158 Mass. 555, 33 N. E. 651. It forbids persons to "distribute". This implies an offering to many people, with the consequent probability of littering the neighborhood with papers which, if not painstakingly gathered by someone, will become unsightly, annoying and obnoxious. We think that the word "distribute", in connection with the other language used and in view of the apparent object of the section, does not include sale, and that the ordinance does not forbid the sale of newspapers or other printed matter in the streets. The section is not in any sense directed toward the suppression of ideas, theories or opinions. It involves no censorship. It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private.

In Commonwealth *v.* Morrison, 197 Mass. 199, at page 204, 83 N. E. 415, at page 417, 14 L. R. A., N. S., 194, 125 Am. St. Rep. 338, this court said, "The primary purpose of a

highway is the passing and repassing of the public, which is entitled so far as needed to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose." In re Opinion of the Justices, Mass., 8 N. E. 2d 179. The constitutional right of free speech cannot be so exercised as to obstruct the public in the enjoyment of its easement of travel. Commonwealth *v.* Surridge, 265 Mass. 425, 164 N. E. 480, 62 A. L. R. 402. See Commonwealth *v.* Davis, 140 Mass. 485, 4 N. E. 577; Commonwealth *v.* Abrahams, 156 Mass. 57, 30 N. E. 79; Commonwealth *v.* Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389, affirmed Davis *v.* Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 L. Ed. 71. The constitutional right to freedom of religious worship does not prevent the enforcement of reasonable rules and regulations for the use of streets and public places. Commonwealth *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A., 142, 12 Am. St. Rep. 566. The preservation of the public right of travel in the streets against annoyance of any kind has always been a proper subject of legislative action. Commonwealth *v.* Fox, 218 Mass. 498, 106 N. E. 137, Ann. Cas. 1916A, 1236; In re Opinion of the Justices, 251 Mass. 569, 595, 147 N. E. 681; Commonwealth *v.* Boston & Maine Transportation Co. 282 Mass. 345, 348, 185 N. E. 40; General Outdoor Advertising Co., Inc. *v.* Department of Public Works, 289 Mass. 149, 181, 193 N. E. 799.

In our opinion this case is to be distinguished from Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, upon which the defendants principally rely. The ordinance which was there struck down was not a regulation of the use of the streets. It was an absolute prohibition of the distribution of "literature of any kind" anywhere within the city, whether delivered free or sold, without the written permission of the city manager. The city manager was thus made the sole arbiter, apparently without appeal, as to what literature of any kind should be allowed within the city. Plainly such an ordinance goes far beyond reasonable regulation and infringes upon fundamental rights. The court said of that ordinance, "It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not

limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." 303 U. S. at page 451, 58 S. Ct. at page 669.

We hold that the section of the ordinances of Worcester here involved is not a denial or impairment of the freedom of the press, but that it is a reasonable and valid regulation of the use of the public ways for the preservation of public order, the protection of travellers from annoyance, and the prevention of misuse of littering of the streets, and that it affects the right of publication only collaterally and incidentally by curbing what the city may regard as abuses detrimental to the public in the manner of the exercise of that right. Commonwealth *v.* McCafferty, 145 Mass. 384, 14 N. E. 451; Commonwealth *v.* Haffer, 279 Mass. 73, 180 N. E. 615; Commonwealth *v.* Kimball, Mass., 13 N. E. 2d 18, 114 A. L. R. 1440. Our opinion is fully supported by well reasoned decisions of the courts of last resort of Nebraska and of Wisconsin in closely parallel cases. In re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; City of Milwaukee *v.* Kassen, 203 Wis. 383, 234 N. W. 352. Whether the legitimate objects of the section could be substantially accomplished by less sweeping provisions is a matter for the consideration of the city's legislative body and not for us.

It follows that the complaints duly charged a criminal offense, and that there was no error in denying the motions to quash and dismiss them.

In each case the entry will be

Exceptions overruled.

Filed March 2nd, 1939.
Attest: Philip S. Smith, Assistant Clerk.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 29.

ELMIRA NICHOLS and PAULINE THOMPSON,
Appellants,

against

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 29.

ELMIRA NICHOLS and PAULINE THOMPSON,
Appellants,

against

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

I. Opinion of the Court Below.

The opinion below was reported in Mass. Adv. 1938, page 1969; 18 N. E. 2nd 166.

II. Jurisdiction.

1. The statutory provision is Judicial Code, Section 237-b, as amended by the Acts of February 13, 1925 and March 8, 1934, U. S. C., Title 28, Section 344-b.

2. The date of the judgment is December 21, 1938, on which date the Massachusetts Supreme Judicial Court affirmed the conviction herein (R., 20). No application for rehearing was made.

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237-b, supra.

Claim of federal constitutional right was raised by a motion to dismiss at the original trial held in the Central District Court of Worcester and there overruled and was again raised upon a trial had de novo in the Superior Court for Worcester County and likewise denied (R., 7). The Supreme Judicial Court of the State in its opinion specifically passed upon the claim of federal right and overruled the same (R., 21 ff.).

The federal right claimed by appellants is that the ordinance under which they were convicted is, upon its face, as applied to them, unconstitutional in denying to them due process of law under the Fourteenth Amendment to the United States Constitution: This claim is grounded upon the contention that appellants' right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills contained in said ordinance (Ch. 36, § 12, Revised Ordinances of Worcester —R., 21) and by the insufficiency of the charge upon which they were tried. The ordinance in question is as follows:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

4. The following cases, among others, sustain the jurisdiction:

Lovell v. *Griffin*, 303 U. S. 444;
Hague v. *C. I. O.*, 59 Sup. Ct. 954.

5. This Court noted probable jurisdiction on May 1, 1939.

III. Statement of the Case.

Appellants were charged with distributing handbills on city streets in violation of the city ordinance (R., 9, 13). The leaflet announced the holding of a meeting to discuss unemployment insurance and relief (R., 8). The distribution was in an orderly and peaceful manner and appellants did not themselves throw any of the leaflets away (R., 6). The only contention was that others had thrown such leaflets on the street and that approximately 15 leaflets were on the sidewalk and 15 in the street (R., 6).

The State Court held that the validity of the ordinance was established by its own previous decision in *Commonwealth* v. *Kimball*, 13 N. E. 2nd 18. The *Lovell* case was distinguished on the ground that the ordinance there struck down was not a regulation of the use of the streets. The Court interpreted the ordinance in the case at bar as directed to the prevention of the accumulation of litter and rubbish and the annoyance of travelers. It construed the ordinance as not preventing the casual passing of papers from one person to another, nor the sale of newspapers or other printed matter.

POINT I.

Appellants' conviction was without due process of law in violation of their right of freedom of speech and of the press.

This Court having, in *Lovell* v. *Griffin*, 303 U. S. 444, ruled that the Fourteenth Amendment protects leaflet distribution, the question now arises whether such protection can be destroyed under the pretext of preventing the littering of streets. That municipalities may punish street littering is, of course, not disputed. But in the case at bar the offense charged was not littering, but distribution. Re-

spondent justifies the charge on the ground that littering resulted from the distribution. It is, however, not claimed that appellants themselves littered the streets, and indeed the evidence is to the contrary. The only claim is that some of the persons who accepted the literature which appellants handed out, subsequently threw it away (R., 6).

If the offense charged against appellants had been littering and the proof had been only that here adduced, serious questions of proximate cause would have been raised. However, since the offense charged was not littering, but distribution, the conviction can be upheld only if a municipality may prohibit an act harmless in itself on the theory that in some instances harm may result from that act. It is submitted that his Court has, in *Stromberg* v. *California*, 283 U. S. 359, ruled otherwise. In that case a conviction for display of a red flag in "opposition" to government was reversed because the statute made no distinction between opposition manifested by lawful means or such opposition when manifested by unlawful ones. A similar view was expressed by Mr. Justice Roberts in *Herndon* v. *Lowry*, 301 U. S. 242, at page 259:

> "And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

So in the case at bar the statute punishes distribution unaccompanied by littering, as well as distribution which has such consequences.

But, if it be argued that the State Court has, by its construction of the ordinance, limited its application to distribution likely to result in littering (see R., 23), we never-

theless believe that the ordinance violates constitutional guaranties. Justification for an ordinance of this more limited character is sought in the police power. And it is argued that, since municipalities have the right to prevent littering, the Courts may not inquire whether the means used are appropriate or necessary. With this principle of judicial self-restraint (compare Mr. Justice Stone dissenting in *United States* v. *Butler*, 297 U. S. 1, at 78) counsel would be the last to disagree. But it is submitted that this principle has no application to the problem now before the Court.

For when the police power comes into conflict with the basic democratic rights of freedom of religion, press and assembly, the conflict must be resolved in different terms. See suggestion by Mr. Justice Stone in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. This Court, in the *Lovell* case, recognized the importance in American life of the political pamphlet. In these troubled times the free distribution of varying points of view is of the utmost importance. There are many groups in the community, religious, political or economic, who are not able to command either the radio or the press for the distribution of their ideas. The only way that they can be heard is by the distribution of leaflets and pamphlets. Such distribution, in order to reach the general public, must be on the public streets. It is absurd to suppose that any effective circulation of minority opinion is possible in communities where ordinances of the kind now under review are permitted to operate. The contention that such ordinances are directed against littering and not against distribution is specious and should not receive the sanction of this Court. To stop littering no such drastic ordinance is needed.

To say that the Courts may not consider the necessity for the restriction upon freedom of speech and of the press because of a claim that the police power has been exercised

would result in the destruction of such basic rights. Therefore, restriction of these rights is permissible only when necessary to prevent serious evil to the state. That was recognized in *Stromberg* v. *California*, supra, where the Court upheld part of the statute there under consideration because it punished incitement to the overthrow of organized government by unlawful means.

In *De Jonge* v. *Oregon*, 299 U. S. 353, the Chief Justice said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

In *Herndon* v. *Lowry*, supra, this Court held unconstitutional a statute which punished an attempt to incite insurrection by persuasion because the utterances upon which the prosecution rested were themselves not unlawful. Mr. Justice Roberts, speaking for the majority of the Court, rejected the contention of the state in that case that utterances having a "dangerous tendency" could be punished. He said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The *Lovell* case carried these views to their logical conclusion in condemning an ordinance which banned all leaflet distribution.

Even before the decision of this Court in the *Lovell* case there had been numerous decisions declaring unconstitutional similar ordinances. The earliest of these was *People* v. *Armstrong*, 73 Mich. 288, 41 N. W. 275 (1889).

See to like effect:

City of Chicago v. *Schultz*, 341 Ill. 208, 173 N. E. 276 (1930);

Ex parte Pierce, 127 Tex. Cr. 35, 75 S. W. 2nd 264 (1934);

In re Cox, 122 N. J. L. 150 (1937);

New Rochelle v. *McCormick*, Westchester L. J., June 11, 1935, page 997.

See also various unreported cases, such as:

City of Newark v. *Hill*, 1 I. J. A. Bull. No. 12, page 2;
People v. *Toth*, 2 I. J. A. Bull. No. 5, page 2;
People v. *Goren*, 4 I. J. A. Bull. No. 3, page 3.

See also 5 I. J. A. Bull., page 147;
Cf.

Star Company v. *Brush*, 185 App. Div. 261, 172 N. Y. Supp. 851 (1918);
Dearborn Publishing Company v. *Fitzgerald*, 271 F. 479 (1921);
In re Campbell, 64 Calif. App. 300, 221 Pac. 952 (1923);
People v. *Armentrout*, 118 Calif. App. 761, 1 P. 2nd 556 (1931).

In some cases the Courts have limited the application of similar ordinances to commercial literature on the ground that any application of the ordinances to pamphlets generally would be an unconstitutional deprivation of free speech. See:

People v. *Johnson*, 117 Misc. 133, 191 N. Y. Supp. 750 (1921);
Coughlin v. *Sullivan*, 100 N. J. L. 42, 162 A. 177 (1924).

Since the decision of this Court in the *Lovell* case, there have been decisions to like effect. In *C. I. O.* v. *Hague*, 25 F. Supp. 127, Judge Clark of the District Court of New Jersey considered that case controlling with regard to an ordinance of Jersey City which banned the distribution of leaflets on streets and public places. He recognized that ordinances having the broad sweep of the ordinance now

before the Court are designed rather to restrict the circulation of ideas than to prevent the littering of streets, saying:

> "The strategy is the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again, traditionally perhaps, being frightened."

In the Circuit Court of Appeals this portion of the decree of the District Court was unanimously upheld. Judge Biggs held the ordinance to be "squarely within the decision" of the *Lovell* case.

In this Court also the ordinance was held void on its face within the *Lovell* case (59 Sup. Ct. 954, 965). Indeed this Court struck out from the decree of the Court below (see 101 F. 2nd 774, at 795) provisions which so restricted the injunction that it would not be applicable where the leaflets were distributed in such a way as to cause littering of the streets.

In *People* v. *Taylor*, the Appellate Department of the Superior Court of California, for the County of San Diego (not yet reported), affirmed a dismissal of a charge based on an ordinance which, like the ordinance now before the Court, prohibits the distribution of leaflets upon any street, park or public place. See also:

> *People ex rel. Gordon* v. *McDermott*, 169 Misc. 743;
> *People* v. *Gilione*, 3 L. R. R. 597;
> *People* v. *Finkelstein*, 4 L. R. R. 77.

For other unreported cases see 7 I. J. A. Bull. No. 1, page 4 (numbered 162 in error).

On the other hand, in addition to the case at bar, and the two other cases now before this Court, a contrary result was reached by the Appellate Department of the Superior Court of California in the case of *People* v. *Jones*. (See Los Angeles Daily Journal, August 9, 1938, and 7 I. J. A. Bull., p. 31; see also unreported cases cited in footnote 15, on p. 32.)

These decisions rested in part on earlier decisions in the same jurisdictions, in part on an attempted distinction between the ordinances in question and the ordinance involved in the *Lovell* case. The earlier cases relied on are in the main inapplicable. Thus in the case at bar the Court relied upon *Commonwealth* v. *Kimball*, 1938 Mass. Adv. 267, 13 N. E. 2nd 18. In the *Snyder* case the Court relied on *Milwaukee* v. *Kassen*, 203 Wisc. 383, 234 N. W. 352; in the *Young* case the Court relied on *People* v. *St. John*, 108 Calif. App. 779, 288 Pac. 53; *Sieroty* v. *City of Huntington Park*, 111 Calif. App. 377, 295 Pac. 564; *San Francisco Shopping News Company* v. *City of South San Francisco*, 69 F. 2nd 879, certiorari denied 293 U. S. 606, and *In re Anderson*, 69 Nebr. 688, 96 N. W. 149.

In the *Kassen* case the Court rested its conclusion largely on the *Anderson* case; besides appellant conceded the validity of the ordinance. In the *Kimball* case the constitutional issues were given scant consideration by the Court. In the *Sieroty* case and the *San Francisco Shopping News Company* case no question of free speech was involved or even discussed, since the ordinances were aimed only at advertising matter. In the *St. John* case, which also dealt only with advertising matter, the Court expressly doubted whether it would be possible to prohibit distribution of religious and political pamphlets without interfering with the constitutional guaranty of free speech.

The *Anderson* case, which is the chief reliance of the prosecution in all these distribution cases, is really not an authoritative decision at all. It is clear that the defend-

ants in the *Anderson* case actually did the littering, since the Court distinguished between their acts which constituted distribution "upon the sidewalk" and other acts prohibited by the ordinance, namely, the handing of circulars to others on the public streets. But in any event the weight of authority, as indicated by the cases previously cited, is against the proposition that *distribution*, as distinguished from *littering*, can be prohibited. It is interesting to note, moreover, that in the *Anderson* case the Court justified its conclusion by citing *Commonwealth* v. *Davis*, 162 Mass. 510. The *Davis* case was considered to be authority for the view that a statute forbidding public meetings in a public park violated no rights of free speech—this Court has now repudiated that view in the *Hague* case.

The chief distinction attempted in the three cases now before this Court is that the ordinance in the *Lovell* case applied to distribution *throughout the city limits*, whereas the ordinance in the other cases applied only to distribution *on the city streets*. It is submitted that that distinction has no validity. Many of the cases cited above held ordinances unconstitutional which were restricted only to distribution on the streets or in public places. Such, notably, was the situation in *Hague* v. *C. I. O.*, supra.

The second ground of distinction taken is that the ordinance in the *Lovell* case was not aimed at street littering, whereas the ordinance in the case at bar was so aimed. In support of that argument reliance is placed in the case at bar (R., 24) on the statement by the Chief Justice in that case:

> "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

It is submitted that the reference in that opinion to littering of the streets was intended to refer to the littering of streets by the person charged with the violation of the ordinance. In the case at bar the ordinance is not limited to distribution accompanied by street littering on the part of such distributor; indeed, as construed, it may not be limited to littering by others actually resulting from distribution since the opinion of the State Court might justify a conviction even though no actual littering resulted, because all distribution tends to produce littering (R., 21, 23).

Even an ordinance limited to distribution resulting in littering would be void because, as we have seen, freedom of speech and of the press can be restricted only where serious danger to the state is shown. Surely no one will contend that such freedom can properly be restricted merely because of fear of street littering. Moreover in order to prevent street littering means other than the complete prohibition of distribution can be employed. Municipalities can provide receptacles for waste paper, they can increase their street cleaning force, they can probably most effectively stop street littering by arresting the actual litterers.

Finally, there is an underlying fallacy in the argument that all leaflet distribution may be prohibited because of the possible littering by the recipients. By the same logic it could be argued that all street meetings could be prohibited because of the possibility that listeners to the speakers might obstruct traffic or because some of the listeners might offer violence to the speaker. This last, indeed, was the argument advanced by Mayor Hague in the *C. I. O.* case which has met with rebuff from this Court. In such situations the evil which the municipality may correct, namely, street littering, obstruction of traffic or disorderly conduct can be prevented by the punishment of those actually committing the wrong, not by prohibition of a lawful act. As a speaker, whose address is lawful, is entitled to police

protection against persons who might break up his meeting and cannot be arrested as a disturber of the peace, even though they use his speech as a pretext for violence, so the distributor of a pamphlet entirely lawful in its contents should not be subject to arrest because someone who accepts the pamphlet from his hands later throws it away.

POINT II.

Appellants' conviction was without due process of law in that they were not charged with the offense of which they were convicted.

Appellants in the case at bar were charged with the violation of an ordinance which prohibited distribution of literature (R., 9, 13). They were convicted of having distributed the literature in a manner such that street littering resulted (R., 23).

Even if it be assumed, as has been done in the foregoing discussion, that a statute is constitutional which punishes distribution because of the littering which may result from such distribution, it is submitted that the conviction in the case at bar fails to meet the requirements of due process of law.

It is settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry*, supra. Therefore, even if the statute as construed is constitutional so that a distributor might be punished upon proof of littering caused by others, nevertheless he cannot be so punished unless he is charged with such offense. If, as claimed by the prosecution this ordinance could be upheld as valid because it has been interpreted to apply only to cases where the distribution produces littering, then the charge should have been as broad

as the ordinance. To charge a person with distribution and to convict him of distribution resulting in littering is in itself a denial of due process. See the statement of the Chief Justice in the *De Jonge* case, supra, at page 362.

In the *De Jonge* case defendant had been charged with speaking at a meeting, not with anything which he did at the meeting. There was some evidence to indicate that he had distributed literature at the meeting containing illegal statements. An attempt was made at the argument of the case in this Court to suggest that the conviction could be justified on the basis of this evidence, but it was clearly pointed out by several of the Justices during the argument that no such conviction was permissible since no such charge had been made. And in his opinion the Chief Justice characterized such a possibility "as sheer denial of due process." So, in the case at bar, it would be such sheer denial to justify a conviction on proof of littering in a case where the complaint contained no reference whatever to littering. Surely defendants had a right to suppose that they were being charged with distribution only and to secure an acquittal because such distribution was wholly lawful.

CONCLUSION.

The judgment appealed from should be reversed and the complaint dismissed.

Respectfully submitted,

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. [redacted] 29

ELMIRA NICHOLS AND PAULINE THOMPSON,
Appellants,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT, COUNTY OF WORCESTER, COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

PAUL A. DEVER,
Attorney General,
EDWARD O. PROCTOR,
Assistant Attorney General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 849

ELMIRA NICHOLS,

Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS.

PAULINE THOMPSON,

Appellant,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPELLEE'S STATEMENT DISCLOSING MATTERS OR GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS.

This Court should not take jurisdiction of this appeal for the reason that it presents no substantial Federal question for decision.

The municipal ordinance of the city of Worcester, Massachusetts, here drawn into question is a reasonable and valid regulation of the use of the public ways for the preservation of public order, the protection of travelers

from annoyance, and the prevention of misuse or littering of the streets or ways, and in no way denies or impairs freedom of speech or freedom of the press, and as thus construed takes it out of the rule announced by this Court in

Lovell v. *City of Griffin*, 303 U. S. 444.

The ordinance is within the authority of the State, under its police powers to promote the health, safety, morals, and general welfare of its people.

Near v. *Minnesota*, 283 U. S. 697, at page 707.

The ordinance is not unlimited as to any time or any place or in any manner, but is strictly limited to public streets and ways in the city of Worcester.

Lovell v. *City of Griffin, supra*, 303 U. S. 444, at page 451.

The appellants say on page 6 *et seq.* of their Statement Disclosing Basis of Jurisdiction of this Court, that their purpose is: "to show that an ordinance such as the one in question * * * is in reality and effect one that creates an unreasonable if not a total restriction on the free dissemination of literature and opinion and is thus in violation of the right of freedom of the press." From that point in their statement the appellants argue that the ordinance if held to be valid will greatly curtail the right of individuals to circulate information and opinion among the public.

The above quoted statement with the subsequent argument to support it puts an interpretation upon the ordinance in question at variance with the interpretation put upon it by the Supreme Judicial Court of Massachusetts. The Supreme Judicial Court of Massachusetts is a court of final jurisdiction and its opinions are final and binding within the Commonwealth of Massachusetts. In the decision of

the instant case by that court, upon which this appeal is grounded, the court interpreted the ordinance here in question. That interpretation is the law of Massachusetts and the statement of these appellants cannot vary or extend its scope. A reading of that opinion (appendix A of Appellant's Statement) clearly discloses that

> "The wording of the section of the ordinance as a whole indicates that it was directed to the object of preventing the accumulation of litter and rubbish in the streets and preserving the comfort and preventing the annoyance of travellers, and that it was not directed against the liberty of the press, Properly construed, we see no reason why in practical operation it should extend beyond the legitimate purpose for which it was designed. It does not prevent the casual passing of papers from one traveller to another in isolated instances. See Commonwealth *v.* Ellis, 158 Mass. 555. It forbids persons to 'distribute'. This implies an offering to many people, with the consequent probability of littering the neighborhood with papers which, if not painstakingly gathered by someone, will become unsightly, annoying and obnoxious. We think that the word 'distribute,' in connection with the other language used and in view of the apparent object of the section, does not include sale, and that the ordinance does not forbid the sale of newspapers or other printed matter in the streets. The section is not in any sense directed toward the suppression of ideas, theories or opinions. It involves no censorship. It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private."

As thus limited the ordinance does not invade the privileges or immunities which the appellants claim for themselves and does not offend against the constitutional guaran-

tees contained in the Fourteenth Amendment of the Constitution of the United States.

The appellee therefore moves to dismiss the appellant's appeal because there is no substantial federal question to be decided and because the subject matter thereof has already been decided by the Supreme Court of the United States.

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Attorney General,
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By EDWARD O. PROCTOR,
Assistant Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 849. 29

ELMIRA NICHOLS AND PAULINE THOMPSON,
APPELLANTS,
v.
COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

BRIEF FOR THE APPELLEE, THE COMMONWEALTH OF MASSACHUSETTS.

PAUL A. DEVER,
Attorney General,
EDWARD O. PROCTOR,
Assistant Attorney General.

ALDINE C. GITCHELL & SON, LAW PRINTERS, BOSTON.

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COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

BRIEF FOR THE APPELLEE, THE COMMONWEALTH OF MASSACHUSETTS.

THE CASE.

The appellants appealed from the judgment of the Superior Court of the Commonwealth of Massachusetts for Worcester County, May 23, 1938, which was affirmed by the decision of the Supreme Judicial Court of the Commonwealth on December 21, 1938, overruling the appellants' exceptions which operated to make said judgment a final judgment (R. pp. 1-3). Their appeal to this court was allowed on March 2, 1939 (R. p. 3).

The appellants were originally arraigned before the Central District Court of Worcester for Criminal Business, charged with violation of the Revised Ordinances of the City of Worcester, chapter 36, section 12. This chapter is headed "Streets" and relates to the care of the public

ways, streets and sidewalks in the City of Worcester (R. 6-7). Section 12 reads:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets."

The appellants moved to dismiss on the grounds that the ordinance is contrary to the Constitution of the United States, Fourteenth Amendment, and void on its face (R. 7).

The trial justice denied the motion, found the appellants guilty and imposed a fine of five dollars ($5.00) on each, from which judgment the appellants appealed to the Superior Court for Worcester County (R. 7).

In the Superior Court the appellants duly moved to quash and dismiss on the ground that the complaint did not allege a crime, that the ordinance was void and unconstitutional on its face and that the ordinance violated the freedom of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The trial justice of the Superior Court denied the motion to quash and dismiss. To this ruling the appellants duly excepted. After trial upon the evidence the justice found the appellants guilty (R. 7), the appellants having waived their right to a trial by jury (R. 11, 15). A stay of execution was granted (R. 16). The appellants prosecuted their exceptions in the Supreme Judicial Court of the Commonwealth, where, after hearing, they were overruled (R. 20), and an opinion thereon was rendered (R. 21-25), reported in Massachusetts Advance Sheets (1938) p. 1969; 18 N.E. (2d) 166.

The Constitutional Provisions Involved.

The appellants invoke the following provisions of the Constitution:

Amendments.

Art. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Art. XIV. Sec. 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Argument.

1. The ordinance in question is a valid regulation under the police power for the preservation of public order, and the prevention, by misuse, through littering, of the public ways, and its specific provisions do not offend against the constitutional guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

The ordinance in question does not fall within the prohibition of the rule laid down by this court in *Lovell* v. *City of Griffin*, 303 U.S. 444, and applied in *Hague* v. *Committee for Industrial Organization*, 59 Sup. Ct. 954.

A. The phraseology of the instant ordinance of the City of Worcester as a whole shows that its intent was limited to the prevention of the accumulation of litter and rubbish

in the streets and that its practical operation would not extend its scope beyond such legitimate purpose.

The ordinance only forbids persons to "distribute." The interpretation of the quoted word by the Supreme Judicial Court of Massachusetts limits its meaning to the gratuitous giving away of the enumerated objects and does not embrace within its scope any *sale* thereof and accordingly does not forbid the sale of newspapers and other printed matter in the street (R. 22).

A comparison of the Massachusetts ordinance and that of Georgia, considered in *Lovell* v. *City of Griffin, supra,* 303 U.S. 444, makes clear the difference between the two.

The Massachusetts ordinance reads:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets."

The Georgia ordinance reads:

> "Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> "Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

It is apparent that the Massachusetts ordinance, unlike the Georgia ordinance, read as a whole, appears to relate to and to have as its purpose, as has already been said, the prevention of accumulation of litter and rubbish in the streets and the preservation of the comfort and safety of travelers therein. It does not by any of its terms establish any system of censorship as does the Georgia ordinance. Thus it is free from the chief element of the evil against which the first amendment to the Constitution was aimed, from which persons are to be protected, an amendment which the court has said is of vital importance to protect the essential liberty of the press.

> *Near* v. *Minnesota*, 283 U.S. 697, 713-716.
> *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245-246.

A similar comparison of the Massachusetts ordinance and that of New Jersey, considered in *Hague* v. *Committee for Industrial Organization, supra*, 59 Sup. Ct. 954, reveals the difference between the two.

The New Jersey ordinance reads:

> "No person shall distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet."

It prescribes severe penalties for its breach.

This ordinance applies not only to the gratuitous distribution of all printed matter, but to the sale thereof, bringing within its purview all newspapers, periodicals and pamphlets. Furthermore, this prohibition is not limited to streets and ways, but extends to all public places. It was interpreted by the court as an absolute prohibition of distribution (Op. p. 965). It was, moreover, linked to other

ordinances forbidding the holding of parades and public assemblies, all of which together clearly indicated a purpose to curb the privilege of free press and lawful assembly.

B. The Massachusetts ordinance is not unrestricted in its application with respect to time or place. It is limited to streets and ways where the giving out of printed papers may well be regarded as inconsistent with the maintenance of public order and clean and unlittered streets. It does not, as did the Georgia ordinance prohibit generally distribution of literature of any kind, at any time and any place and in any manner within the city limits without the requisite permit from the city manager acting virtually as a censor. Nor does it, as did the New Jersey ordinance, contain an absolute prohibition against distribution of all kinds of literature in all public places.

C. By the interpretation given to the word "distribution" in the Massachusetts ordinance by the highest court of the Commonwealth the ordinance does not forbid the sale of newspapers or other printed matter even in the streets, as did those of Georgia and New Jersey, and this is of importance as tending to show the intention of the makers of the ordinance to pass only a measure fully within the police power, namely, for the preservation of the public welfare by provision for clean and unlittered streets. It is obvious from the usual mode of human behavior that persons are more likely to retain in their possession and not to throw away onto streets at the first opportunity an object for which they have paid money as distinguished from an object which has been given to or thrust upon them gratuitously. The Massachusetts ordinance involves no censorship, no interference with the publication or distribution of anything in the City of Worcester except that

for reason immediately affecting the public welfare there must not be gratuitous distribution in the public streets. The ordinance merely withdraws the public streets and ways from places available for free distribution, leaving open for distribution all the rest of the city.

The construction placed upon the ordinance by the Supreme Judicial Court of Massachusetts relative to the sweep of the word "distribution" will be adopted as determining the meaning of that word as used in the instant ordinance.

J. Bacon & Sons v. *Martin*, 59 Sup. Ct. 257.
Olsen v. *Smith*, 195 U.S. 332, 343.
W. W. Cargill Co. v. *Minnesota*, 180 U.S. 452, 466.
Anglo-American Provision Co. v. *Davis Provision Co.*, 191 U.S. 373, 374.
Soper v. *Lawrence Bros.*, 201 U.S. 359, 370.
Orr v. *Allen*, 248 U.S. 35, 36.

2. THE SCOPE OF THE MASSACHUSETTS ORDINANCE IS OF SUCH A LIMITED CHARACTER THAT IT DOES NOT TO A MATERIAL EXTENT INTERFERE WITH THE LIBERTY OF THE PRESS EITHER IN PRODUCTION OR CIRCULATION.

The scope of the Massachusetts ordinance is so limited that it does not even in the matter of distribution affect the guaranties of the liberty of the press so as to render it unconstitutional.

In maintaining these guaranties, the power of the State, and inferentially of its subdivisions, to enact laws in the exercise of the police power to promote the health, safety, morals and general welfare of its people is not swept away, though such authority must be exercised with appropriate regard to the particular subject-matter to which it is directed, and it must stop short of material interference with such guaranties.

The historic concept of the liberty of the press as to its freedom from censorship and arbitrary restrictions upon the character of its expressions has been set forth by this court in

Near v. *Minnesota, supra,* 283 U.S. 697.
Grosjean v. *American Press Co., supra,* 297 U.S. 233.
De Jonge v. *Oregon,* 299 U.S. 353.
Ex parte Jackson, 96 U.S. 727.

Such concepts of the liberty of the press are not, it is submitted, invaded by a regulation of the character of the Massachusetts ordinance. The ordinance in question does not in intent or effect create a total restriction on the free dissemination of literature and opinion, nor any general arbitrary or unreasonal' restriction on the distribution or sale of such literature and opinion. It merely prevents its dissemination in one particular manner, which manner, as has been pointed out in the opinion of the Supreme Judicial Court of Massachusetts (R. 7), may affect adversely the public welfare through the interference with travelers in the public way.

As was said by the Supreme Judicial Court of Massachusetts (R. 22):

> "Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired."

Gitlow v. *New York,* 268 U.S. 652, 666-667.
Whitney v. *California,* 274 U.S. 357, 371.
Stromberg v. *California,* 283 U.S. 359, 368.

Similar ordinances to that of Massachusetts providing for a reasonable regulation of the use of streets, which affects only incidentally one method of distributing printed matter, have been upheld as constitutional.

Commonwealth v. *Kimball*, 1938 Mass. Adv. Sh. 267; 13 N.E. (2d) 18.
In re Anderson, 69 Neb. 686.
Milwaukee v. *Kassen*, 203 Wis. 383.
Cf. *Davis* v. *Massachusetts*, 167 U.S. 43, affirming *Commonwealth* v. *Davis*, 162 Mass. 510.

It is submitted that the Massachusetts ordinance falls squarely within that class of ordinances which this court in its opinion in *Lovell* v. *City of Griffin*, *supra*, 303 U.S. 444, inferentially indicated might be sustained because in no way open to the following objection found in the Georgia ordinance, of which the court said:

> "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, . . . or the misuse or littering of streets."

The Massachusetts ordinance is plainly limited to ways which this court would seem to have had in mind in employing the quoted phrase.

Respectfully submitted,

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